UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

MERWIN HOXSEY
SHELL OIL COMPANY

Docket No. UG-IX-229C

Marvin E. Jones
Administrative Law Judge
1735 Baltimore
Kansas City, Missouri 64108

INITIAL DECISION

By Complaint filed February 22, 1977, Respondent Shell Oil Company (Shell), [along with Merwin Hoxsey (Hoxsey), operator of the subject retail outlet where both leaded and unleaded gasoline were offered for sale] was charged with violation of 40 CFR 80.22(f)(1) of the Fuels and Fuel Additive Regulations, which requires "retailers" [as defined by 40 CFR 80.2(k)] to equip each gasoline pump dispensing leaded gasoline with a nozzle spout having a terminal end with an outside diameter of not less than 0.930 inches, in that there were attached to pumps 172592 and 173528 from which leaded gasoline was on November 9, 1976 sold at subject outlet, nozzle spouts having a terminal end outside diameter smaller than 0.930 inches. Said complaint proposed a civil penalty of $6,000 be assessed against Shell.

An Adjudicatory Hearing in this cause was convened on August 23, 1977, at 100 California Street, San Francisco, California. At the opening of the Hearing, it was announced that a like charge against Hoxsey had been settled; therefore, this decision will deal only with the charge against Shell.

40 CFR 80.22(f)(1) provides, in pertinent part, as follows:

"(f) After July 1, 1974, every retailer shall equip all gasoline pumps, ...as follows:

"(1) Each pump from which leaded gasoline is introduced into motor vehicles shall be equipped with a nozzle spout having a terminal end with an outside diameter of not less than 0.930 inch (2.363 centimeters)."

40 CFR 80.2(k) and (j), respectively, defines "retailer" and "retail outlet" thus:

> "(k) 'Retailer' means any person who owns, leases, operates, controls or supervises a retail outlet. (emphasis supplied)
>
> "(j) 'Retail outlet' means any establishment at which gasoline is sold or offered for sale for use in motor vehicles."

The facts found herein are stipulated by Complainant and Shell as follows:

1. Shell Exhibit A evidences a lease of subject retail outlet, owned by Mr and Mrs Harvey Eugene Hill, to Shell on May 22, 1952.

2. Shell subleased said retail outlet to Hoxsey by a Dealer Lease (Shell Exhibit B) dated October 1, 1975, the terms of which provide that the operation and control of said business and its operation shall be and remain in Hoxsey.

3. An agreement between Shell and Hoxsey dated and entered into June 21, 1974 entitled "Dealer Unleaded Compliance Agreement" (Shell Exhibit C) requires that the violation of 40 CFR Part 80 will be prevented.

4. Letters dated April 14, 1974 and September 15, 1975 (Shell Exhibits D and E) were forwarded by Shell's District Manager to all Shell's dealers, including Hoxsey.

5. The basic relationship between Shell and Hoxsey is set forth in the said Dealer Lease (Shell Exhibit B) including specifically, Article 11 thereof.

6. Hoxsey owned the nozzles, including specifically those nozzles which are the subject of the instant Complaint, at subject retail outlet, on November 9, 1976 (date of the violation charged) and at all times pertinent to the instant inquiry.

7. Shell Exhibit C (see finding 3, supra) requires Hoxsey to have the gasoline pump dispensers (both lead and unleaded) equipped with

nozzles in compliance with regulations (40 CFR Part 80), and, further, to maintain them in good condition and repair and in compliance with said regulations.

8. Shell has taken affirmative action to ensure that Hoxsey and other dealers are in compliance with their contractual obligations set forth in said Shell Exhibit C (see finding 3, supra).

9. On November 9, 1976, during an official US EPA inspection at subject retail outlet, the outer diameter of the terminal end of three nozzles on pumps 172592 and 173528 (used to dispense leaded gasoline) were found to be less than 0.930 inches.

10. The civil penalty proposed by Complainant is based on a single violation of said 40 CFR Part 80 and such violation consists of three nozzles failing to meet said regulatory requirements.

CONCLUSIONS OF LAW

1. As the lessee and sub-lessor of the subject retail outlet, Shell "leases" said retail outlet and "leased" said outlet at all times pertinent to the instant case.

2. Shell is a "retailer" as defined in 40 CFR 80.2(k) and within the meaning of 40 CFR 80.22(f).

3. Shell, at all times pertinent herein, had a positive and affirmative duty under said applicable regulations to equip, or cause to be equipped, all leaded gasoline pumps at subject retail outlet with nozzle spouts conforming to and in strict compliance with said Section 80.22(f)(1).

4. Shell's failure to so equip subject leaded gasoline pumps is a violation of said regulations and an appropriate civil penalty should be assessed.

My comments with respect to my conclusions reached are contained in Attachment "A", entitled "MEMORANDUM COMMENTS", attached hereto and made a part hereof.

PROPOSED CIVIL PENALTY

In proposing a civil penalty properly to be assessed on the basis of the entire record, I have given consideration to factors set forth in 40 CFR 80.330(b)(1).

The subject inspection resulted in a finding that three (3) nozzles on two pumps at subject location had an outer diameter at the terminal end measuring less than 0.930 inches. The record does not indicate the exact diameter of said terminal ends. There is no indication of any previous bad record of compliance. The facts stipulated indicate that Respondent has informed its dealers of the existing applicable regulations in an attempt to prevent violations by them. Respondent's demeanor has undoubtedly been influenced by the mistaken theory that its legal duties and responsibilities for compliance have been shifted contractually to said lessees. The gravity of this case is typified by the fact that the three violations were present at this one location. Considered in mitigation is the fact--which is not challenged by Complainant--that Respondent has affirmatively acted to effect compliance (from and after the violations charged) at all retail outlets where its branded name is on display. On consideration of all said factors, it is my recommendation that a civil penalty of $4,500 be assessed against Respondent.

This Initial Decision and the following proposed Final Order assessing penalty shall become the Final Order of the Regional Administrator unless appealed to or reviewed by the Regional Administrator, as provided in 40 CFR 80.327(c):

FINAL ORDER

It being hereby determined that Respondent Shell Oil Company has violated Section 80.22(f)(1) as alleged in the Complaint issued herein, a civil penalty is hereby assessed against it in the sum of $4,500.00 and Respondent is ordered to pay the sum by Cashier's or Certified Check, payable to the United States Treasury, within sixty (60) days of receipt of this Order.

This Initial Decision is signed and filed this 3rd day of November 1977.

Marvin R. Jones

ALJ

MEMORANDUM COMMENTS

Respondents in this, and similar cases, contend, as a defense, that "there is no evidence...which in any way disputes the fact that (the retail operator) was in full control of the operations on the premises on the date of the subject violation, and at all other times" and that he "owned all nozzles" at all times pertinent. In this manner a foundation is laid for the further argument that US EPA regulations subject it to "vicarious" liability where control is not sufficiently present, and no employee or agency relationship exists.

This same argument was proferred, in substance by Amoco Oil Company (February 1, 1977, US EPA Region VII, Docket No. 059239). We there stated:

> "It can be seen we are not here considering vicarious liability...but liability placed...on every retailer for failure to comply with a duty directly imposed by 40 CFR 80.22(f)(1)."

Respondent here, as Amoco, is defined as a retailer by virtue of the word "leases" in Section 80.2(k), supra. Other descriptive words such as "operates" or "controls" subjunctively present in said definition are excluded by application of the verb "leases".

As we have previously pointed out, if it is Respondent's contention that the applicable regulations impose an unfair burden upon it, the obvious answer is that this is not the forum for attacking these regulations. However, rather than appear to ignore the various, though inappropriate contentions made, the following observations will be included herein.

In the Amoco Oil Case, supra, we stated:

> "But there exists good and valid reasons for the regulations here pertinent. The controls, promulgated as 40 CFR Part 80, applicable to all aspects of the purchase and sale of gasoline, are regulatory in character and establish a program which must lend assurance that the public health or welfare will not be

endangered by emissions from fuels or fuel additives; important to this concern is the assurance, as well, that the emission products will not impair the performance of any emission control device in, or expected to be in, general use by the public. On the advent, in 1975, of catalytic converters, which can be impaired by certain fuel additives, particularly lead, provisions which regulate leaded gasoline became an essential part of such fuel regulation. [See Clean Air Act, Section 211, 400 U.S.C. Sections 1857f-6c (1970, ELR 41220.)]

"It is clear that, if the 'essentials of the intention of Congress' are to be achieved, such regulatory program must succeed. It is not sufficient that a nozzle such as the one here in question may have at one time been in compliance with applicable regulations. It is thus apparent that a policy is both reasonable and essential which places a positive and continuing obligation on all 'retailers' to equip or cause to be equipped the 'leaded' pumps at retail outlets with nozzle spouts conforming to said Section 80.22(f)(1). Strict adherence to such policy is essential if such regulation is to succeed in meeting its important objective."

Section 211(c)(1)(B) authorizes the Administrator, by regulation, to control the manufacture and sale of any fuel or fuel additive for use in a motor vehicle "if emission products of such fuel and fuel additive will impair to a significant degree the performance of any emission control device...".

By granting such authority "to regulate", Congress recognized that the manufacture and sale of such product was a business "affecting the public interest".[1/] Pursuant to such authority, the Administrator formulated the regulations here applied (40 CFR Part 80) and afforded refiners the opportunity for comments and suggestions.

Respondent seizes upon language of a former US EPA Administrator, in the January 10, 1973 Federal Register, that the term "retailer" was borrowed from Section 111(a)(5) of Title I of the Clean Air Act and argues that said section construed in conjunction with Section 111(e) thereof evidences Congress' intent that only those operating a retail

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1/ Thus, the rights and duties of Respondent will likely be viewed as those existing in the cases of a Public Utility. (See 73 C.J.S., "Public Utilities", p. 995, et seq, Sec. 4, et seq.) E.g., a public utility cannot by contract relieve itself of liability for negligence in the performance of its duty to the public or the measure of care it owes to its patrons under the law. (Id., p. 996, Sec 5, n. 93).

outlets can be held to have violated any regulations. It will be noted that the term "to operate" is not defined but that said Section 111(a)(5) indicates that the words "owner" and "operator" are to be used interchangeably and bear the same definition. For this reason and for further reasons hereinbelow cited, I do not interpret Administrator Ruckelshaus' statement in the context urged. Respondent further argues that Amoco I (Amoco Oil Co v. EPA, 501 F 2d 722 (D.C.Cir. 1974)), which applied to liability for offering for sale as unleaded gasoline product containing lead in excess of .05 grams per gallon, should be here applicable. The obvious answer is contained in Amoco Oil Company, Region VII, Docket Numbers 033204 and 033219, Final Decision of the Acting Regional Administrator (April 1, 1977), on review of the Initial Decision of John H. Morse, Presiding Officer, assessing civil penalties for nozzle violations, where it is stated, l.c. 5:

> "The conclusions and the rationale in Amoco I and II do not appear to be controlling on the issues here involved. There, the problem was essentially the extent to which the negligence of a retail operator resulting in the commission of a prohibited act could be imputed to a brand name refiner regardless of its legal relationship to or control over the retail outlet. The reason for promulgating Section 80.23 with special reference to brand name refiners was that it was deemed appropriate to impose upon such a refiner [which would not be within the express terms of 80.22(a) unless it was also a retailer] some responsibility to guard against contamination of unleaded gasoline, not only in the refining process but in the distribution to and delivery by the retail outlet. Here we are concerned with a duty to equip pumps with specified nozzles which is imposed upon every retailer, that is upon every person who owns, leases, operates, controls or supervises a retail outlet. Since the owner has the same responsibility as the lessee-operator, it is not a question of imposing on the former vicarious liability for the wrong doing of the latter."

Continuing, said Final Decision also states:

> "Respondent quotes from the preamble to the regulations as promulgated January 10, 1973 (38 FR 1254,1255), the statement that the industry had sought clarification of the term "owner or operator" of a retail outlet as

used in paragraphs (c), (d), and (g), Section 80.22 and that those paragraphs had been modified to adopt as a definition any person who "owns, leases, operates, controls or supervises" a regulated facility; and since this definition is derived from the definition of owner and operator in Section 111(a)(5) of Title I of the Clean Air Act, respondent seeks to draw an inference that the Administrator intended that a retailer, to be liable for a violation, must actually operate the facility in violation of the standards. The explanation of the change in the preamble related, of course, to the fact that in the regulations as originally proposed (37 FR 3882, et seq. February 23, 1972) some parts of Section 80.22 (including the provision for nozzles, then in subparatraph (g)) referred to "owner and Operator of a retail outlet" while other portions referred to "retailer" which was originally defined as "a person selling, or offering for sale, gasoline to the public". From this clear and quite significant change in the designation of persons responsible under Section 80.22, the logical inference is that the Administrator intended that the owner of a retail outlet, as well as the operator thereof, should have a duty and responsibility to equip the pumps with the required nozzles.

"Respondent further argues that to hold the owner-lessor responsible for a failure to have proper nozzles would somehow violate historical principles of property and tort law with reference to the obligations of the parties under leases of real property or business facilities. We are not concerned, however, with the problem of imputation of liability upon one for the tort of another; nor indeed are we concerned with a tort at all. We are concerned with the duty of the owner of a retail outlet to provide certain equipment to protect the public, that is, to guard against accidental introduction of leaded gasoline into a car equipped with a catalytic converter; just as a state or municipal authority might require, for the protection of the public, that the owner or operator of a gasoline service station have on hand prescribed fire extinguishers. If respondent has imposed upon its lessee some contractual responsibility, this proceeding will not affect their respective rights and obligations as between themselves; and if respondent has some contractual recourse against its lessee, that is another matter entirely and is not the concern of the public or this agency."

Respondent correctly notes that 40 CFR Part 80 was amended on December 12, 1974 (39 FR 42350). The clarification there mentioned contains at page 42358, second column, language corroborating the construction here given to the definition in said Section 80.2(k), because of the presence of the word "lessee", as follows:

> "it is not the intention of the regulations to impose the same liability upon the branded refiners where the retailers are operator-owners instead of lessees...".

Respondent fails and refuses to recognize the import of the terms "regulation" and "in the public interest", the first always being existent for the protection of the latter. The great volume of cases where a defendant has been held subject to criminal sanctions for a violation of a statute or regulation promulgated for the protection of the interests of the public, furnish ample precedence for the duty placed on branded refiners and the consequent liability where such duty is violated. United States v. Parfait Power Puff Co., 163 (F 2d) 1008 (1974); United States v Shapiro, 491 (F 2d) 335 (1974); United States v Dotterweich, 320 U.S. 277, 64 S.C. 134 (1943); and United States v Balint, 258 U.S. 250, 42 S.C. 301.

In the above cases, and the many others cited therein, the defendants were faced with sizeable criminal penalties and incarceration. Said laws were enacted by a Congress determined to obtain compliance with measures necessary for the protection of the public interest. The civil penalties proposed to be assessed by the regulations governing this case are analogous to the statutory penalty provided in the cases cited. Their primary purpose is to obtain compliance so that the public will be protected. Unless they accomplish that purpose, they are neither adequate nor effective.

In Parfait, supra, l.c. 1009 (1, 2) the Seventh Circuit Court of Appeals stated:

> "In this situation, it is defendant's position that the violation was not that of itself...But we are not concerned with any distinction between independent contractors and agents in the ordinary sense of these words. It is clear that defendant was engaged in procuring the manufacture and distribution of the article... It saw fit to create out of...activities

> in its behalf an instrumentality and to avail itself of the acts of that instrumentality, which effected (a violation). This we think it could not do without incurring the criminal penalty imposed... The liability was not incurred because defendant consciously participated in the wrongful act, but because the instrumentality which it employed, acting within the powers which the party had mutually agreed should be lodged in it, violated the law. The act of the instrumentality is controlled in the interest of public policy by imputing the act to its creator and imposing penalties upon the latter.

Balint and Dodderweich both held that Congress concluded that it was preferable, in "balancing relative hardships", to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers..., rather than to throw the hazard on the innocent public who are wholly helpless".

Parfait continues, l.c. 1010(3):

> "... In other words, one who owes a certain duty to the public and entrusts its performance to another, whether it be an independent contractor or agent, becomes responsible criminally for the failure of the person to whom he has delegated the obligation to comply with the law, if the non-performance of such duty is a crime...". (citing cases).

As criminal sanctions so imposed were approved by the Court as justified for the purpose of obtaining compliance with rules governing the manufacture and handling of product and essential for the protection of the public, a fortiori, the imposition of civil penalties is here justified.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; I am Regional Hearing Clerk, Environmental Protection Agency, Region IX; my business address is 100 California Street, San Francisco, California; and on November 9, 1977, I served a copy of the hereunto annexed Initial Decision In the Matter of Merwin Hoxsey, Shell Oil Company, Docket No. UG-IX-229C on the following parties by placing a true copy thereof, certified mail, return receipt requested, postage prepaid, in a United States Postal mail box, or hand delivering, at San Francisco, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 9, 1977, at San Francisco, California.

Lorraine Pearson
Lorraine Pearson